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In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute for Justice is strengthening the ability of individuals to control and transfer property and advancing the belief that property rights are intricately connected with other civil rights.

Although the question in the case before this Court specifically involves a question of proper statutory interpretation, the case addresses several larger issues involving private property rights, the proper role of administrative decision-making in a free society, and the inevitable consequences of permitting government officials to be insulated from the costs of an expansive interpretation of a statute. The Institute's brief is co-authored with Professor Richard Epstein, one of the nation's leading authorities on property law.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

This case concerns a single question of statutory construction that raises vital questions of both constitutional design and public policy. The Endangered Species Act (ESA), first passed in 1973, represents a vast and highly integrated effort by Congress to prevent the unwarranted destruction of various species of fish, wildlife, and plants found to be threatened with extinction. The federal powers under the ESA take two forms. First, the ESA contains a prohibition against the taking of an endangered species, where the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." Endangered Species Act § 3(19), 16 U.S.C. § 1532(19). To implement this provision, the Secretary has issued regulations that construe the term "harm" to include any "significant habitat modification or degradation where it actually

kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Second, and beyond the ESA's power to prevent harm, the Secretary has a separate and distinct power of habitat acquisition "by purchase, donation, or otherwise" to "conserve fish, wildlife, and plants." Section 5(a); 16 U.S.C. § 1534(a).

The sole question of law in this case is whether the regulations on habitat modification fall within the power of the Secretary to prevent harm to endangered species under the ESA. The question is not simply an arid exercise of statutory construction. It raises profound questions about the security of property rights and the limits on government power in a free society. To see the importance of this question, one must begin not with the details of the ESA, but with an examination of the consequences that follow when the term "harm" is construed so broadly as to embrace any human action that alters habitat and leaves an endangered species worse off than it otherwise might have been. Under the challenged definition, any human act of productive labor can be regarded as causing harm because any such action could modify some habitat of some endangered species. Resources are finite and any use of them for human advancement could be interpreted as having some negative consequences on the habitat of some species protected by the ESA. All forms of human activity, even those which are necessary for human survival, can be interdicted under the Act if the Secretary's regulation is allowed to give the ESA such broad interpretation.

A statute that attaches extensive criminal penalties to harm to endangered species, *see* 16 U.S.C. § 1540, should construe the term "harm" as it is normally construed under the criminal law: as an act which implies the threat or use of force against a member of the species protected under the Act, a meaning which is congruent with all the other terms contained within the statutory definition of "take." There is no reason why that term should be construed, especially by administrative fiat, to punish the same productive activities that the criminal law, under its central principle of harm prevention, protects from the aggression of others.

Not only does the Secretary's regulation turn the statute and the criminal law on its head, but it also is destructive of the very result – the preservation of habitat – that it seeks to achieve. One obvious unwanted consequence of this misguided interpretation is that it encourages individuals to destroy habitat at great rapidity at the first hint that some species may be placed on a protected list. What other consequence can be expected when a perceived public good becomes a local disaster to the hapless owner on whose property the habitat is located? Worse still, there is no way that any owner of land can obtain security from the United States by repurchasing from the government the original bundle of property rights that he enjoyed prior to regulation. A contractual settlement with the United States is at best a temporary palliative. The next day may bring with it the designation of another species' habitat so that the cycle of compromise and surrender will continue until the use of vast tracts of land can be controlled by administrative designation. Correctly construed, the harm principle is an essential element of a well-ordered society. No administrative regulation should invoke the criminal law to subvert this vital principle.

This distortion of the classical harm principle is entirely unnecessary. The acquisition programs explicitly authorized under the ESA provide all the necessary means for the preservation of habitat. By placing the important task of habitat designation on-budget, the total level of social resources committed to the program can be determined by explicit democratic evaluation and not by covert administrative action. Yet by the same token, antisocial private actions remain subject to affirmative sanction both civil and criminal, since the ESA clearly blocks all acts of aggression that "take" endangered species.

These two halves of the ESA, then, work together in perfect harmony as a matter of social policy and of statutory construction, and the resulting synthesis conforms completely to the basic principles of constitutional jurisprudence as set out in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). Under the ESA, as in *Lucas*, the background principles of tort and nuisance, long developed at common

law, set the line between those actions that the government may restrict without compensation and those which require compensation. The imaginative biologist can find some habitat destruction in every productive use of land, even those that do not come within a country mile of a common law nuisance. Without any explicit authorization from Congress, the Secretary cannot designate by a stroke of the pen vast expanses of private property as critical habitat, which their owners can use only on pain of criminal sanctions. When the United States wishes to prohibit ordinary construction and use of a home, farming, mining, and recreational activities, it should buy the needed habitat for endangered species, just as it must buy land for the national park system. Congress could have hardly intended otherwise.

The structure and constitutional setting of the ESA make it clear that the Secretary may prevent habitat modification only on payment of compensation. If Congress itself were to amend the ESA to authorize the Secretary to designate private lands as protected habitat without payment of just compensation, that amendment would precipitate a major constitutional challenge as a physical or regulatory taking under the Fifth Amendment. Absent any specific authorization, the Secretary cannot redesign the fundamental structure of the ESA by administrative regulations that explicitly choke off all possibility of compensation without Congressional authorization. Read in its entirety, the ESA clearly does not authorize the taking of habitat without compensation; nor, if ambiguity is created where none should be found, should there be any deference to agency determinations under the *Chevron* doctrine. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Not only does this aggressive interpretation of the ESA trench on traditional private property rights, but it also performs an additional disservice by effectively preventing sensible state regulation of private property in those core areas of the police power: matters of the safety and health of its people. No regulation could declare that black is white, or up is down. And none should be allowed to treat the ordinary and productive use of property as a criminal act. The power to designate should not be

transformed by administrative fiat into the power to rule with impunity.

ARGUMENT

I. VIEWED AS A WHOLE, THE ENDANGERED SPECIES ACT PRECLUDES ANY AGENCY DETERMINATION THAT MODIFICATION OF HABITAT CONSTITUTES "HARM" THAT MAY BE ENJOINED UNDER THE ACT.

A. "Harm" Within The Statutory Definition Encompasses Only Those Actions That Attack Or Threaten A Listed Species, But Does Not Include Any Modification Of Habitat.

This case arises under a challenge to regulations that the Fish and Wildlife Service (FWS) has issued to govern habitat modification under the Endangered Species Act (ESA). Section 9 of the ESA makes it unlawful

> "for any person subject to the jurisdiction of the United States to – . . .
>
> (B) take any such species within the United States or the territorial sea of the United States;

Section 9(a); 16 U.S.C. § 1538(a).

The definition provisions of the statute then define "take" to mean

> "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 3(19); 16 U.S.C. § 1532(19).

The definition provision of the statute is in turn interpreted by the contested regulation as follows:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential

> behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

The sole question before this Court is whether the FWS regulations exceed its authorization under the ESA. It is evident that the ESA allows powerful sanctions to be imposed on individuals whose aggressive actions threaten to take, kill or wound endangered species. That is how it should be. To require the state to pay individuals not to kill endangered species is to invite everyone to encompass their death. Force must be used to meet force, just as the ESA provides.

Within this framework the term "harm" plays an essential mop-up role that insures that no form of aggressive behavior escapes the scope of the ESA. Consider its relationship to the other verbs on the list. Harass and pursue clearly cover situations where threatening acts are done to worry or vex an animal. These are acts that threaten capture, wounding or killing. For their part, hunting, shooting, wounding, killing, and trapping all involve the use of force either directly or, as in the case of traps, indirectly. None of these terms, however broad, clearly cover cases in which individuals might seek to *poison* animals (without wounding, trapping or killing them), perhaps by polluting the waters they drink or by feeding them contaminated food. Yet here again it would be socially destructive to pay people not to poison animals. In light of the statutory objectives, the term "harm" therefore should be construed in a broad and distinctive way under the ESA, *without* expanding its meaning in ways that allow it to obliterate or overwhelm the remaining terms found in the definition section of "take."

The question is whether the scope of the ESA should be further extended. Here the heavy set of criminal penalties imposed – fines of up to $200,000 and imprisonment of up to one year for each "take" – counsels against any expansion of the criminal law by administrative regulation when there is no good reason to do so. The appropriate cautionary spirit also moved Judge Williams in the court below. When he invoked the Latin maxim *noscitur a sociis* – a term is known by the company it keeps – he was only using good common sense to

fix the meaning of a term by its context. *Sweet Home Chapter of Communities v. Babbitt* ("*Sweet Home II*"), 17 F.3d 1463, 1465 (D.C. 1994). A similar conclusion was reached in *United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir. 1993) in interpreting the term "harass" under the Marine Mammal Protection Act: "One hardly need rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion [that 'words grouped in a list should be given related meaning.']." *Sweet Home II*, 17 F.3d at 1466 n.2 (quoting *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 312, 322, n.16 (1977)). No subtle canon of statutory construction is required.

Judge Williams also showed that any alternative construction of the term "harm" would lead to indefensible conclusions.

> As a matter of pure linguistic possibility one can easily recast any withholding of a benefit as an infliction of harm. In one sense of the word, we "harm" the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop "ethnic cleansing".

Sweet Home II, 17 F.3d at 1464.

Indeed, the absurdities of the government's elastic definition, applied generally, make it impossible for individuals to avoid harm no matter what they do. The only way to avoid harm in Somalia or Bosnia is to expend resources for their assistance. Under the Secretary's definition, who is to say how many resources have to be expended before we move from the realm of causing harm by withholding resources to conferring benefit by expending them? In addition, *no* increase in our expenditures for their assistance can *eliminate* harm. Under the government's elastic definition, greater aid in Somalia or Bosnia necessarily "harms" the children of Appalachia or Harlem all of whom could have been aided by the same dollars. By this logic, the very enforcement of the ESA necessarily harms (and harms without compensation) not only the regulated landowners, but also the disappointed beneficiaries of every other government program whose

resources are diverted to the enforcement actions of the ESA. It is simply nonsensical, under the ESA or anywhere else, to give "harm" a definition so broad that harm is inflicted upon another person no matter what action is taken. All social and natural resources are limited. Their efficient deployment for one person cannot be treated as harming another.

The basic point here reflects familiar and important principles of political philosophy. The harm principle at stake in this litigation was not originally invented to aid in the explication of the ESA. It has a long philosophical pedigree most closely associated with the writings of John Stuart Mill. In his famous essay *On Liberty*, Mill invoked the harm principle *to limit* the role of government interference in the affairs of ordinary citizens.

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

Mill, *On Liberty* 13 (Shields ed. 1956) (1859). Mill himself was alert to the risk that the harm definition could be expanded to swallow the basic presumption of liberty. Accordingly, he gave that term a sensible construction consistent with its social function by limiting it to "fraud or treachery, and force." *Id.* at 150. That caution is wholly lacking here as the disputed regulation renders the harm principle useless for its intended purpose by giving it a construction so broad that all forms of productive human activities are swept within its folds, far beyond what any conception of the law of

nuisance would require or tolerate.[1] Far from becoming a charter of individual liberty consistent with Mill's vision of limited government, the new and expanded definition of harm becomes the iron fist of an all-pervasive government presence. By verbal sleight of hand, all productive activities become a presumptive evil until they are shown to be a good – to the satisfaction of the same government officials whose expansionist impulses led to the adoption of this incorrect definition in the first place.

B. The "Actually Kills Or Injures" Language In The Disputed Regulation Places No Principled Or Effective Limits In Constraining Excessive And Unreasonable Habitat Designation Under The ESA.

A closer examination of the regulation contained in 50 C.F.R. § 17.3 offers additional support to the conclusion that the harm principle cannot be extended to cover cases of habitat modification. The first sentence of the regulation restricts "harm" to an act "which actually kills or injures wildlife." The second sentence of the regulation plunges the entire subject of harm into unwanted obscurity when it stipulates that an act that kills or injures wildlife "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." The Solicitor General claims that this sentence "merely elaborates on the basic definition in the first sentence

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[1] On the definition of nuisance, *see, e.g., Morgan v. High Penn Oil Co.*, 77 S.E.2d 682 (N.C. 1953): "any substantial non-trespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance;. . . . "; *see also* California Civil Code:

> §3479. NUISANCE DEFINED
>
> Anything which is injurious to health, or is so indecent or offensive to the sense, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

by explaining its application in one particular context." Brief for Petitioners at 21. That statement is incorrect. His sugar-coated account of the second sentence in the regulation wholly ignores the massive transformation when habitat modification is treated as harm under the ESA, for it addresses none of the difficulties with the concept developed in Section A above.

The regulation is defective for yet another reason: the confusion of past with future. For animals that have been killed or wounded, it is possible to determine whether some discrete act "actually" did the harm in question. But these powers of observation cannot be brought to bear on possible future actions, which might never happen. Within this context the word "actually" loses all of its bite and imposes no limitation on the power of FWS officials to designate all the world a habitat, actual or potential, for some listed species. Since there is always future uncertainty, any change in external environment will *always* influence the probability of survival of any given species. It becomes all too easy therefore for the FWS to presume the very harm that its own regulation requires it to establish.

This use of presumptions allows the FWS inexorably to expand its vice-like hold over land use. The term habitat is not defined in the ESA and has no natural boundaries or contours. A small meadow might be a habitat for a rare bird, but by the same token it is possible to designate a number of counties as the habitat for a particular species, given the potential range over which "breeding, feeding or sheltering" can take place. Indeed just that has been done in central Texas for the ostensible benefit of the golden-cheeked warbler, thereby calling into question all construction or development. Under the definition of harm championed by the government, the entire United States could become habitat, actual or potential, for one or another of the many species that are listed, or may be listed in the future, as endangered or threatened under the ESA.

Unfortunately that exercise of raw power does not follow any specific showing that a species has "actually" been killed or injured by the particular practices that are forbidden by the

FWS. Rather the entire process represents a decision by the FWS to protect too much habitat rather than too little. To be sure, the Solicitor General noted that the actual harm language in the regulation was added in 1981 "because of concerns that the 1975 regulatory language was susceptible to an interpretation that would bar habitat modification even where there would be no resulting injury to the listed fish or wildlife, contrary to the intent of both the Secretary and the Congress." *See* Brief for Petitioners at 6 (citing 46 Fed. Reg. 54,748 (1981), J.A. 65). This calm reassurance should be treated as a *fatal* concession about the scope of the regulation, for the current, stated practices of the FWS do not give even cursory attention to the restrictive language in the habitat regulation.

The dangers of this regulatory approach are well illustrated by the tragic Riverside, California fire episode which resulted in the destruction of some 29 homes by fire in late October, 1993. In 1988, the region was designated as habitat for the Stephens kangaroo rat. Prior to that time common practice and local fire ordinances required landowners to disk their land – that is, to plow under the thick mat of desert grasses to mineralize the soil in order to prevent the spread of fires. The FWS prohibited this practice over the repeated and heated objections of local fire officials and ranchers. A letter of July 5, 1990 from Brooks Harper, the Office Supervisor of the Southern California Field Station of the FWS to Captain Paul Smith of the Riverside Fire Department stated baldly: "Therefore, disking within the historic range and *potential* habitat of this species puts the County and land owner at risk of violating Section 9 of the Endangered Species Act."[2] Is it really a sound construction of the ESA to think that Congress meant to displace routine fire prevention precautions in its single-minded pursuit of its statutory objectives? And does anyone think that the FWS could have mustered Congressional support if it had to *pay* for the substantial losses in

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[2] The full text of this letter is set out in Sugg, *Rats, Lies and the GAO* at Appendix III (Competitive Enterprise Institute, August 1994).

income to farmers, loggers and other landowners brought about by this restriction?

The expanionist impulses of the regulation's harm definition are not only revealed on matters of space, but also on matters of time. Resolving the question of whether given areas are habitat is a time-consuming and costly process in which landowners have to prove that their property does not constitute habitat once that claim of habitat has been made. The current Secretary of the Interior has written that on matters of habitat designation time is no object so that "when a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land." Babbitt, "The Triumph of the Blind Tree Salamander," *E Magazine*, March/April 1994 at 55. The Secretary never did explain how the three-year moratorium is authorized under his own regulation, or why it does not constitute a temporary taking of property under this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Nor did he provide any assurances that the moratorium would be lifted when the three-year period was over without some definitive plan in the FWS.

So the process continues apace: first the regulations extend the reach of the statute; next the practice extends the regulations. What starts out as a prohibition against the killing of animals ends up as a comprehensive system of federal land use regulation, enforced by heavy criminal penalties.

C. The Acquisition Powers Under The ESA Give The Secretary And The FWS Sufficient Means For Any Responsible Government Program Of Habitat Preservation.

This radical expansion of the ESA by regulation 50 C.F.R. § 17.3 is wholly gratuitous because other sections of the ESA make specific allowance for habitat acquisition by purchase or condemnation. *See* ESA, § 5; 16 U.S.C. § 1534. So long as the government is prepared to pay the price for the private activities foregone, then it can adopt as habitat any

lands, public or private, that it sees fit. In this setting, the difficulties with defining habitat are not nearly as important as they are when the FWS acts under regulation, because any broad habitat designation carries with it an obligation to pay. The FWS will therefore have a set of built-in incentives to reach a workable accommodation on habitat even if no precise definitions are available.

But it will be said that so long as the government is required to pay for what it takes, it will take less than it can when it operates by simple decree. And rightly so. Enforcing the just compensation requirement always reduces the appetite that government officials have for private property. That limitation is regarded as fortunate when the government occupies land or restricts its viable economic use. Why is this regulation any different?

Stated otherwise, the cautionary pressure of the takings clause directs government activity along sensible paths and moderates its natural excesses. There is, so to speak, critical habitat and critical habitat, which is to say that all critical habitat, like all land, is not of equal value. The requirement that compensation be paid for loss of use to owners properly forces government experts to rank the habitat for preservation in accordance with the objectives of its program. Government officials will be forced to live with the same principles of diminishing marginal utility that apply to all other forms of rational human activities. So bound, the budgetary pressures will curb the government's expansionist impulses without the need for constant supervision of its many activities. Suitably constrained, the FWS will no longer deliberately dally for three, five or ten years before it announces its plans – or better yet, hearings on plans – to allow continued development of valuable resources. No longer will it designate vast tracts of land as critical habitats – as has been done with the golden-cheeked warbler and the Stephens kangaroo rat – without regard to the consequences that its actions have on the individuals who live and work there. Like everyone else, the FWS will work within a budget, which could be as large or as small as Congress decides.

Yet it has been said that the costs are too enormous to pay for out of revenue. *See* Brief of *Amici Curiae* Scientists at 18. But that argument confuses real economic costs with transfer payments. The economic costs for society are incurred once land is taken out of productive use, and once all development is forbidden. Once the regulation is in place, the payment of compensation for these losses does not increase their size. Nor does the nonpayment of compensation reduce the total amount of real wealth devoted to the cause of habitat preservation. Nonpayment only conceals the identity of the parties who are called in the first instance to pay these costs, and conceals from public view the size of the total burden that they are asked to pay for programs. Justice Scalia stated the fundamental difficulty with hidden taxes in *Pennell v. San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring): "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes." It is just this "off-budget" invisibility that calls for reproach of the Secretary's regulation. The *amici curiae* scientists may well be correct in the high social priority that they attach to habitat and species preservation. But if so, they should be candid about what those costs are. On countless occasions this Court has noted that the function of the just compensation clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That fundamental lesson was respected in the original drafting of the ESA. The Secretary should not be allowed by clever redefinition to escape the built-in structural limitations that are contained within the ESA.

The basic theoretical point made here has already been borne out in practice in the aftermath to this Court's decision in *Lucas*. In that case, this Court remanded the case to the South Carolina courts to determine whether the restrictions imposed on the Lucas holdings constituted a regulatory taking. When that court found that they did, *Lucas v. South*

Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992), the lots in question were deeded over to the state for about $1,500,000. How quickly the incentives change! No longer did public officials make pious declarations that the emptiness of two prime beachfront lots was indispensable to the well-being of the fragile South Carolina coast and that cost to the landowner was irrelevant. Nothing stopped the Coastal Council from keeping and managing the land in the most environmentally responsible way imaginable – except the $1,500,000 in taxes needed to pay for lands that were worth that much in private hands. But no responsible land manager could justify the expenditure of that large sum of money on holding these lots empty when it was difficult to raise even a tenth of that sum to replenish sand on public beaches lost to erosion. So South Carolina swallowed its pride and did the only sensible thing: it sold off the lots to the highest bidder *with* the right to build the same single family residences that Lucas had planned to build in the first place. The need to pay for what one takes changes behavior for the better. That truth was respected in the text of the ESA. And it was ignored in the regulations.

The aftermath of *Lucas* is instructive as well because it gives the decisive answer to the arguments that were raised by Judge Mikva in the original *Sweet Home* decision. There he claimed:

> There is also little force behind appellants' claim that including habitat modification within the meaning of "take" renders the land acquisition provision of § 1534 a nullity. Appellants suggest that agency officials will not pay to acquire land if they can accomplish the same objective without cost by banning the offending land use. But there are in fact many reasons why, in its effort to protect endangered and threatened species, the government might choose to acquire land rather than simply forbid damaging activity. Federal wildlife managers can surely do more to help such species on government-owned and controlled preserves than they could ever accomplish on private lands.

Sweet Home Chapter of Communities for a Great Oregon v. Babbitt ("Sweet Home I"), 1 F.3d 1, 10 (Mikva, J., writing separately). But this passage ignores the powerful incentives at work once habitat designation becomes a routine alternative to the acquisition of critical habitat by purchase. Thus even if one supposed that the government could achieve only 90 percent of its objectives by designation, what likelihood is there that it will purchase the full 100 percent of land value to obtain that remaining ten percent of control? Instead its path of least resistance is to impose endless conditions before allowing the private use or development of land. The extensive delays and oppressive use of the permit power offer the government easy vehicles to reach its end, so that the voluntary acquisition becomes a side show to the main act. That conclusion is borne out by the available figures on habitat acquisition by purchase, which were listed at $253,900,761 to purchase 359,755 acres between 1967 to 1993. U.S. General Accounting Office, Report No. GAO/RCED-95-16, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* at 4-5 (1994). That figure works out to about $10,000,000 per year in acquisition of about 15,000 acres per year. To put the magnitude of the land acquisition program in proper perspective, contrast its 359,755-acre size with a number many times larger, the 3.8 million-acres of "coastal scrub habitat" in a "regional conservation plan for a single species," the coastal California gnat-catcher. *See* Brief of the *Amici Curiae* Scientists at 19 n.48. The habitat-by-designation program ties up unknown hundred-fold of land by both acreage and value, for which the FWS pays nothing by way of compensation for the loss of use. Contrary to what Judge Mikva supposes, it is passing strange that the habitat acquisition program that is specifically outlined in the ESA should account for, at a guess (since no one can say for sure what the total costs are) far less than one percent of the total resources devoted to habitat preservation. Can one say with a straight face that over 99 percent of the social resources devoted to habitat preservation should come from an administrative interpretation which is totally without any underlying statutory authorization?

D. The Mitigation Programs Available Under The ESA Do Not Justify The Secretary's Expansive Definition Of Harm.

The extent of the government power to take over property by unilateral and unreviewable designation is also revealed by another commonly-used government practice under the ESA. In the topsy-turvy world of environmental regulation the Secretary may issue "incidental take" permits on condition that the regulated landowner "mitigate" the environmental damage, that is, make certain accommodations on other portions of his land. The Secretary is empowered under this section to issue the "incidental take" permit "under such terms and conditions as he shall prescribe." These terms and conditions include the setting aside of other lands for critical habitat, and contain a further provision that "the applicant will ensure that adequate funding for the plan will be provided." *See*, ESA, 16 U.S.C. § 1539(a). This permit power has Alice-in-Wonderland consequences when "harm" is construed wrongly to cover all cases of habitat modification, however innocent or beneficial. The ESA expressly provides that the United States shall buy land for habitat preservation. Under the regulations now in effect, FWS sometimes allows an owner to buy back some of the use rights he or she possessed before the habitat designation. But at no point does FWS assume any of the burdens or liabilities associated with ownership. It is easy to see why the condemnation alternative will be avoided when habitat designation is allowed.

In principle the government's mitigation program might have desirable features. One of the common criticisms of regulation is that it is so rigid that there are no corrections of original mistakes in resource allocation brought on by a government decree. The mitigation option allows the necessary corrections to take place by contracts between government and private parties, and surely an ESA with some mitigation is better than a statute that only allows the FWS to remove land from use and development, never to return.

But this mitigation program is inherently unstable. The FWS insists that it has the power to sell to private individuals use and development rights. But it never explains how it

acquires those rights in the first place because it cannot candidly acknowledge that it can only resell rights that it has just taken by designation from their owners. Nor can the FWS acknowledge that the same process that produced one set of permit requirements, followed by mitigation, can be invoked a second and a third time, so that a transaction never comes to closure, and the security of ownership is lost forever. While land is costly for its owner to acquire, the *re*designation of that same land as critical habitat is costless for the government to pursue. If a landowner can be required to set aside half of his land to provide habitat for a listed bird in one day, then he or she can be required to set aside half of the remainder as critical habitat for the endangered tree-frog the next, until by degrees all is lost.

The problem raised by this regulation illustrates a fundamental truth about the powerful effect that legal incentives have on both public officials and private persons. *See* Buchanan, *Constitutional Economics* 37-38 (1991); Gwartney, "Public Choice and the Conduct of Representative Government," in *Public Choice and Constitutional Economics* 3, 7-10 (Gwartney & Wagner, eds. 1988); Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986). The reason why one does not try to buy out one's enemies in time of war is that it only invites others to commit aggression in the same fashion. And so it is here. The FWS regulation on property rights only invites the government to resell land that it first takes by unilateral designation. To treat this regulation as a fair explication of the statute is to celebrate a process where the government first designates itself the creditor for $1,000 and then agrees to magnanimously settle the claim for half that amount, only to adopt that same strategy again and again until all private wealth winds up in public hands. To take comfort in using mitigation for habitat designation is little better than to celebrate the thief who is quite willing to sell property back to its original owner in ways that mitigate his loss.

A common error infects all this prescription for sound government: creating the opportunity to repurchase only

encourages the original wrongful act. So long as that is the case, then government should be able to demand mitigation as of right only when it can show that the individual landowner has done some form of a *wrong*, which is impossible with habitat modification unless the uniform voice of the common law of this country and England has all along confused productive uses with common law nuisances.[3] Only if the obligation to compensate for the imposition of habitat restrictions is placed squarely on the government – which the ESA and the takings clause of the Fifth Amendment both require – will it be possible to escape this surreal world. The horror stories that abound in briefs presented by various groups and state officials in their amicus briefs, of which the tale of the Stephens kangaroo rat is only one, *infra* at 11-12, all happen for a structural reason. The FWS has no strong reason to limit its demands when it is not required to pay for the habitat it acquires.

E. The Incentive Effects Created By The Secretary's Regulation Lead To The Destruction Of The Very Habitat That The Government Wishes To Preserve.

The full mischief of the habitat regulation is not captured by a discussion of the baleful effects that this regulatory

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[3] The account of the Roman law of capture for wild animals is wholly garbled in the Brief of the *Amici Curiae* Scientists. *See Id.* at 24. The traditional Roman Law position was that all wild animals were *res nullius* (which is not the same as *res communes*, or common property), which could be reduced to private ownership, without limitation by capture. *See* Justinian, *The Institutes* 66 [Book II] (Thomas ed. & trans. 1975) (A.D. 553): "Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by anyone become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner." For a similar sentiment *see* Gaius, *The Institutes* 153 [66] (Gordon & Robinson eds. & trans. 1988) (circa A.D. 179). Justinian had discussed common property earlier. Justinian, *supra*, at 65-66. Only later did recognition arise of the capacity of sovereigns to prohibit the capture of wild animals. *See* Grotius, *The Law of War and Peace* 81-82 [Book II, Ch. II] (Loomis trans. 1949) (1625). At no point in a classical source in either the English or civil law tradition is there any glimmer of the proposition that the sovereign could acquire critical habitat by simple designation.

process has on government behavior. A complete analysis of the incentive effects of any legal rule also considers the position of the regulated parties as well as that of the regulator. Just that concern with incentives is what explains why the ESA rightly imposes punishments on individuals who kill, wound or capture members of listed species. To see why that is the case, assume that the converse were adopted, so that the state decided to *pay* all individuals *not* to harm these animals. If there were only a *single* individual, then the choice of compensation or punishment would be of little consequence. The optimal payment could substitute for the optimal fine to make sure that listed species received the protection intended for them under the statute. *See*, Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960); Wittman, *Liability for Harm or Restitution for Benefit*, 13 J. Legal Stud. 57 (1984). But it is manifestly the case that *many* individuals pose threats to listed animals, and the choice of the legal rule has a decisive effect on the behavior of large groups of unorganized officials. Any system of compensation for not taking animals would induce individuals who otherwise would never care to kill or take listed species to make threats that would elicit compensation from the government. The supply of private offenders, however, is far more limited than the supply of government permits for public officials. The use of fines changes that result enormously, for now individuals who harm – the word is used here in ordinary English – animals know that they will pay a price that is at least as great as the social harms that their actions cause. It is, of course, a difficult question to determine the optimal level of deterrence, given the uncertainties over the frequency of harm and the severity of its occurrence. But at least the sanctions imposed for harming listed species move in the right direction, even if they are imperfectly calibrated.

Once the question turns to the modification of habitat, these vital incentive arguments cut in the opposite direction. Thus when the government decides to pay individuals for valuable habitat that is on their land, the net result is to elicit their cooperation. Persons who discover that they have a valuable stream or nest on their property now have every

reason to preserve and protect it, because that habitat is an asset which can then be sold to the government, or, more sensibly, to a private group or association dedicated to the purchase of critical habitat. The key point is that the individual on whose property the habitat is located profits to the extent that the habitat is preserved. Even if that person does not want to sell the habitat for some stated price, then there is good evidence that the habitat, however valuable in its own right, may be more valuable in some other use.

It may well be objected that the purchase option in this case does not create optimal incentives for the protection of habitat, given the limitations on public funding and the pressure of alternative private uses for land and water. But the best should never be the enemy of the good. The correct question to ask is not: does the compensation system contemplated under Section 5 of the ESA provide optimal incentives for habitat preservation? No set of rules can achieve that set of goals. Rather, the only question worth asking is whether the incentives created by a compensation system are better than those which the Secretary has created out of whole cloth under his regulations. They are not. Consider this recent account:

> Ross Perot had a problem. In 1990 his development company wanted to turn 330 prime acres of real estate near Austin, Tex., into shops and homes. But the land was chockablock with ash juniper trees, the sole source of nesting material for a little bird called the golden-cheeked warbler. The warbler was about to come under the protection of the Endangered Species Act, which would make it illegal to harm its habitat. So Mr. Perot's company did what just about anybody would do – it chopped down the trees as fast as it could.

Mann & Plummer, "Environmental Law is Wrecking the Environment," *The New York Times*, March 2, 1995, at A15.

It is easy to see why "anybody" would do the same thing. The social gain comes at too high a private price. But the deleterious effects of the regulation cut still deeper because the regulation surely induces *illegal* actions as well. To see

why, imagine the utter dismay that a landowner must feel when he discovers that valuable habitat for a listed species might be on his land. The ESA celebrates the presumption that there are enormous social gains from this discovery. The Secretary's regulation assures that the landowner suffers enormous private losses if information about the habitat is made public. Now the private choices are these: *one*, destroy the private habitat of listed species and run the risk of serious penalties under the law; *two*, report or allow the information to be discovered, and then bear an enormous, uncompensated cost when farming, logging, building, fishing and the like are all disrupted. It is of course possible to raise the sanctions on wrongdoers so high that in the interests of self-preservation they will prefer the loss of home and livelihood to the rigors of a long jail sentence or heavy fine. But to adopt this course of action has bad consequences of its own, for it throws the entire criminal law into disrepute by equating the productive use of one's own land with the destruction of the property of others.

It is critical to dwell upon the incentive effects of these habitat regulations at such length, not only to show the extraordinary legal innovations that are introduced through regulation, but also to point out the enormous gaps in reasoning in the brief on behalf of a distinguished roster of *amici* scientists. It is not our point here to quarrel with the overriding weight that these scientists attach to the question of habitat preservation. It is their prerogative to give great weight to matters that may carry less weight to ordinary citizens who lack this deep professional and intellectual commitment. Our point is to demonstrate that nothing in the *amici* scientists' brief recognizes that the *means* chosen under the ESA will backfire for its chosen end, given the perverse incentives it gives ordinary citizens who labor under the lash of the regulation.

It is also worth noting that most of the ills that are addressed in the brief of the *amici* scientists cannot be cured by *any* interpretation of the ESA. Many endangered species

live in the tropics, beyond the jurisdiction of the United States. For these species the only chance that we as outsiders have to improve the situation is to adopt the alternative that is belittled here – to pay compensation in order to set aside large scale habitats for the preservation of these species. *See* Myers, *The Sinking Ark: A New Look at the Problem of Disappearing Species* 265-66 (1979). One means for carrying out that program is so-called debt for nature swaps whereby "an international environmental organization buys foreign debt in exchange for agreement by the debtor country to protect its natural resources or to promote conservation." *Developments in the Law: International Environmental Law*, 104 Harv. L. Rev. 1484, 1570 (1991). The compensation approach is vastly superior to raising the sanctions on wrongdoers. Closer to home, vast amounts can be done to improve the weak management of public lands that arises precisely because neither government officials, nor the private firms that deal with them, reap the gains from careful stewardship and management. Experience demonstrates that private nature conservancies can do a better job in species preservation than the Federal government. A key reason for their success is that these private preservers must operate through the purchase mechanism that is belittled by the *amici* scientists.

The affirmation of imperative ends does not guarantee intelligence in the selection of sensible means. It is not sufficient to say that deprivation of habitat and the killing of listed species are the same simply because they each have the same effect on endangered species. Rather, the task is to devise a set of social institutions that encourage responsible conduct and reasoned tradeoffs and not the wholesale overreaching by government officials, and destructive counterstrategies by private parties who seek to avoid its burden. The *amici* scientists assume the wisdom of the Secretary's habitat modification strategy. They do nothing to demonstrate it, or to show how their own preferred policy objective is consistent with the language and structure of the ESA.

II. THE COURT OF APPEALS' INTERPRETATION OF THE ESA IS CONSISTENT WITH THE STANDARDS OF REVIEW SET OUT IN *CHEVRON U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL*.

In the course of its brief, the government places great reliance on this Court's seminal decision in *Chevron*. There this Court articulated the following two-part test which guides this current inquiry:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

A. The Habitat Modification Regulation Is Invalid Under The First Prong Of The *Chevron* Test.

The first prong of *Chevron* requires respect for Congressional intent when the statute is clear. The clarity of a statute cannot be ascertained by referring solely to the isolated terms – here "take" and "harm" – which are subject to interpretation. These terms are embedded in a complex statutory scheme, and they are illuminated in relationship to other portions of the statute. Even if one thought that the term "harm" and hence the term "take" were infinitely elastic when standing alone and taken out of context, that interpretation would be falsified by the other provisions of the statute which

place it in context and set definable boundaries against the Secretary's expansionist impulse. Once "take" in section 9 of the ESA is read in conjunction with the habitat acquisition provisions in section 7 of the ESA, then "take" becomes far clearer than it does when standing alone. Section 9 deals with private parties and in respect to them it is appropriate to forbid only those actions which are tantamount to aggression against endangered species. Yet section 7 is primarily directed to "Interagency Cooperation" in the administration of lands that are already owned by the Federal government. In that connection there are no private rights that limit the exercise and use of federal power. It is perfectly permissible to require, as *only* section 7 provides, to "insure" that any "agency action" does not "jeopardize the continued existence of any endangered species or threatened species *or* result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (emphasis added). The contrast between jeopardizing a species and habitat modification shows how Congress "directly addressed" the "precise question" that is before this Court. The Court need go no further than section 7 to determine the precise meaning of "take" and "harm" as it is used in section 9 of the ESA. In one sense therefore the inquiry is at an end; for this statute, read as a whole, is neither silent nor ambiguous.

B. No Deference Is Warranted Under The Second Prong Of *Chevron* Since The Habitat Modification Regulation Would Eviscerate Vested Constitutional Rights And Would Run Roughshod Over Traditional State Police Powers Essential To The Safety Of The Community.

Even if some lingering doubt remained about the first prong of *Chevron*, it seems clear that the interpretation impressed upon the ESA by the Secretary's regulations cannot be sustained under the second prong of the *Chevron* test. The second prong of *Chevron* says that in those cases in which there is some ambiguity, a court ought to defer to the agency. But there are important considerations, not present before the Court in *Chevron*, which when understood limit the scope of

permissible judicial deference. *Chevron* involved the question of how many smokestacks constituted a single source under the Clean Air Act. At issue in that case was the question of whether all smokestacks from a given plant should be treated as a single new source – such that the regulated entity was free to move pollution back and forth among these devices so long as it complied with an overall cap – or whether each smokestack should be treated as a separate point source subject to its own distinct limitations, without the benefit of trade. The EPA reached the *sensible* conclusion that the stacks could be treated as a single unit, given that this rule promoted a greater level of plant efficiency at zero or negligible environmental cost. But even if that decision had come out the other way, it was perfectly clear within the context that *neither* decision by the EPA would raise serious constitutional issues. Yet those concerns clearly limit the scope of deference under *Chevron*. As this Court wrote in *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 465-66 (1989):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). . . . It has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

Just that situation has developed here, given the blanket denial of all compensation claims under the Secretary's regulation. The government cannot rely on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) because that case held that the disputed regulation was valid precisely

because it did *not* preclude a takings challenge for its excessive application. But in this case, the whole point of expanding the definition of harm to include habitat modification is to cut off the very prospect of compensation that saved the regulation in *Riverside Bayview Homes*, where the government prevailed "on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *Id.* at 128. That possibility is blocked off by definition if the modification of habitat regulation is sustained by this Court. Surely it surpasses all understanding to say that the government can defend a regulation intended to impose compliance without compensation on the ground that it has admitted power to impose the same regulation with compensation! There is, accordingly, no occasion for *Chevron* deference here.

Moreover, the collision between habitat regulation and the takings clause will necessarily arise in some significant class of cases now that the FWS can stop all use and development of land dead in its tracks. Actions of that sort are routinely regulatory takings under *Lucas* and/or temporary takings under *First English*. Ironically, the government that demands a broad definition of "taking" under the ESA insists on the narrowest possible construction of that term under the Constitution. There is, however, authority in the circuit courts which indicates that deference to administrative determinations cease under *Chevron* when the government actions work a taking of private property. *See e.g.*, *Bell Atlantic Tel. Cas. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liabilities both massive and unseen."). All the more is that deference misplaced when Congress itself has specified the compensation route which the administrative regulations consciously seek to evade or ignore.

It follows therefore that the level of deference afforded administrative agencies under *Chevron* should be sharply limited when the interpretative issue concerns the exercise of their delegated authority. As John Locke stated long ago, the

elected political branches of government themselves operate by the authority delegated to them by the people: "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." Locke, *The Second Treatise of Civil Government* 71 [¶ 141] (Gough ed. 1948) (1689). Locke's concerns with delegation remain imperative even in the current world of administrative agencies. While it is tempting to defer to agency determinations on the ground of their supposed expertise, that argument rings hollow where the issue in question is the construction of a term that has a settled meaning in the law of tort and a clear philosophical pedigree. It is doubly misleading when the agency in question has a built-in bias. Another requirement of the just state, according to Locke, is "a known and indifferent judge, with all authority to determine all differences according to the established law." *Id.* at 63 [¶ 125]. That condition of neutrality cannot be achieved when administrative power is wielded by those with a single-minded determination to achieve a single end, and wielded over those who have a different, but equally valid conception, of the social good.

The principle reached here is not one that is either new or novel. Indeed that rule of construction has been applied even in England whose system of Parliamentary supremacy necessarily precludes any entrenched protection of individual rights against the government. Nonetheless the important moral, social and economic place of private property within the overall legal system has led to exactly the conclusion that is urged here: ambiguous statutes ought not be read in ways that authorize the confiscation of private property. Thus in *Mayor of Bradford v. Pickles*, 1895 App. Cas. 587 (H.C.), an 1842 statute conferred upon a private company the power to take certain water and simultaneously imposed fines on other individuals that made illegal diversions from that water. The corporation then transferred those rights to the Town of Bradford in 1854 by a new statutory grant that reaffirmed that the Town had succeeded to all rights held by its private predecessor in title. The question of statutory construction was

whether these two statutes vested, first in the original company and then in the Town, the right to all flowing water (not in a definite channel or watercourse) or whether that statute only protected from "illegal" diversion that water that the Town had purchased from its owner. Whatever doubts might have existed on linguistic grounds could not defeat the equities of the individual landowner. Under an early version of the clear statement rule "the mere fact that the section, as construed by the plaintiffs, affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs." *Id.* at 594. The basic point was unexceptionable. Even where the literal text of the statute seems to be in *favor* of the construction pressed by the government, the statute will be construed to protect property rights against outright confiscation. Surely the level of deference to administrative agencies under *Chevron* cannot be greater when these constitutional guarantees are in place.

There is a second reason why *Chevron* deference is not appropriate under the circumstances of this case. *Chevron* itself dealt with a situation where federal preemption was clear and without doubt. But this Court has taken a view that comity between federal and state governments is an important value, such that preemption should not be lightly inferred when it requires the state to forfeit the exercise of its essential police power functions: the protection of life and property. In *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981), this Court sharply distinguished between the federal preemption of federal law and the federal preemption of state law, saying:

> Contrary to the suggestions of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question " 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Jones v. Rath Packing Co.*,

430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947)).

Yet this trampling of local authority will surely take place if the habitat regulation is upheld. There are many local ordinances that require, for example, the disking of land to prevent the spread of fires. The Riverside County Fire Ordinance required such disking, which was forbidden by the FWS in its effort to protect the habitat of the Stephens kangaroo rat. It takes a good deal of wishful thinking to believe that Congress when it passed the ESA had so single-minded a purpose that authorized any lowly regional administrator within FWS to trump all state fire protection laws. The touchstone of statutory construction is a fair effort to construe statutory language so that it achieves Congressional objectives without trenching on the prerogatives of the states. No deference under *Chevron* is required when the known consequences of the Secretary's regulation are the frustration of the purposes of species preservation, the destruction of private property and the productive energies that it can release, and the invalidation of all local fire regulations essential for the protection of human life and property.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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